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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JUAN MANUEL ANDAZOLA, Petitioner, **v.** **JEANNE S. WOODFORD, Warden,** Respondent.	C 07-6227 PJH

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

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JUAN MANUEL ANDAZOLA, Petitioner, **v.** **JEANNE S. WOODFORD, Warden,** Respondent.	C 07-6227 PJH **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner Juan Andazola seeks federal habeas corpus relief from his state-court convictions for assault with a firearm and attempted murder.

PROCEDURAL HISTORY

On September 18, 2003, petitioner was convicted by a jury in the Contra Costa County Superior Court of assault with a firearm (Pen. Code, § 245(a)(2))[1/] and attempted murder (§§ 187(a), 664(a)), with enhancements for great bodily injury (§ 12022.7(b)), personal use of a firearm (§ 12022.5(a)(1)), and personal use of a firearm causing great bodily injury (§ 12022.53(b), (c) & (d)). Clerk's Transcript on Appeal (CT), lodged as Exhibit 1, at 682-683. On December 5, 2003, the trial

1. Unless otherwise indicated, all statutory references are to the Penal Code.

court sentenced petitioner to life with the possibility of parole on count 1, with an additional consecutive sentence of 25 years to life for the section 12022.53 enhancement (personal use of a firearm causing great bodily injury). CT 716-719.

Petitioner challenged his convictions on direct appeal and in a petition for writ of habeas corpus filed in the California Court of Appeal on May 23, 2005 and October 21, 2005, respectively. On February 22, 2006, the Court of Appeal affirmed the conviction in an unpublished decision. Exhibit 4. That same day, the Court of Appeal summarily denied the habeas corpus petition. Exhibit 4.

Petitioner submitted his claims to the California Supreme Court in a petition for review (Exhibit 5) and in a petition for writ of habeas corpus (Exhibit 7) filed on April 3, 2006 and April 5, 2006, respectively. Those petitions were summarily denied by the Supreme Court on June 14, 2006 and February 14, 2007, respectively. Exhibits 6 and 8.

On December 10, 2007, petitioner presented his claims to this Court in a federal petition for writ of habeas corpus. On December 19, 2007, this Court ordered Respondent to answer the petition.

FACTUAL BACKGROUND[2/]

Ramiro Pichardo testified that on the afternoon of April 3, 2002, he went to petitioner's house because he had been told that "the gentlemen at the house" suspected him of stealing a CD (compact disc) player. Pichardo wanted to clear his name. He stated that he had been to the house before, had met petitioner on two or three occasions, and had never had negative interactions with petitioner.

Upon arriving, Pichardo briefly spoke with a childhood acquaintance, Denicio "Nene" Boforquez (Borforquez), before they both entered a small, one-car garage where a group of people

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2. The facts presented here are taken from the opinion of the California Court of Appeal (Exhibit 4 at 2-7), with minor stylistic modifications. A similar statement of facts, with citations to the record, can be found in Respondent's Brief on Appeal (Exhibit 3) at 2-10.

were talking, smoking marijuana,[3] lifting weights, and listening to music. Griselda Delgado (Delgado), a man named Mike, and petitioner and his wife, Marquita, were in the garage. Pichardo lifted weights and smoked marijuana for about half an hour until he was "stoned." He testified that Boforquez raised the issue of the CD player and Pichardo denied he had stolen it. Boforquez then suggested that Pichardo leave.

Pichardo said he approached petitioner to shake his hand and then suddenly "blacked out." He recalls waking up, unable to feel his legs and, upon seeing his blood on the garage door, realized he had been shot. After he crawled outside, Boforquez covered him with a blanket and the paramedics arrived. He was transported to the hospital, where he learned he had been shot in the back.

Pichardo's Hospital Interviews

Later that evening, Pichardo told police officers that he thought he had been shot by Boforquez because Boforquez had been standing behind him, petitioner had been standing in front of him, and Boforquez was the one who had told him to leave the garage. However, that night, after receiving at least one phone call from Boforquez, Pichardo reassessed his conclusion. He testified that Boforquez cried and repeatedly apologized for what had happened, and said that petitioner had shot Pichardo. At trial, Pichardo testified that after approaching petitioner to shake his hand, Pichardo turned around because he saw petitioner's angry face. Pichardo was, therefore, "pretty sure" that he had been shot in the back immediately after he turned away from petitioner.

Officer Bruce Brown (Brown) testified that he interviewed Pichardo three times in the days following the shooting. In the first interview, Pichardo said he thought he was shot in the back as he was facing petitioner, and he was relatively positive that Boforquez was the shooter.[4] Brown testified that he thought Pichardo may have been threatened after the first interview because he

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3. There is evidence to suggest that Pichardo also used methamphetamine while in the garage.

4. While in the hospital, Picardo repeated this interpretation of events to Pittsburg Police Inspector Wasteney, Officer Del Greco, and Inspector Huppert.

became "wishy-washy" in later interviews. Pichardo admitted that his conversation with Boforquez had influenced his memory of the shooting, but he denied that Boforquez had threatened him.

Dr. Burton Baker treated Pichardo on the evening of the shooting. He testified that an alert and oriented Pichardo told him that he had been using methamphetamine and marijuana with another man who accused him of stealing something from him and then shot him in the back with a pistol at a distance of about five feet. The bullet entered below the left shoulder blade and lodged in Pichardo's spinal canal, rendering him paralyzed below the waist. Dr. Burton believed the bullet was fired from an angle slightly above the left portion of Pichardo's back and went into his body at a straight downward path. He testified further that if a person was bent over at the waist when shot from behind, he would expect the path of the bullet to travel upward, not downward as it had in Pichardo.

Delgado

Police Detective Ed Sanchez (Sanchez) testified that he interviewed Delgado on the night of the shooting. She told him that she was a friend of petitioner's wife, Marquita, and that she had walked to petitioner's home shortly after the shooting and did not know the identity of the shooter.

Police Officer Javier Salgado (Salgado) testified that he received a phone call from Delgado two days after the shooting, on April 5, 2002. Delgado told Salgado that her initial statement to Sanchez had been false, and that she wanted to tell Sanchez the truth.

Salgado picked Delgado up at her house and gave her a ride to the police station. According to Salgado, during the drive Delgado told him: she had been inside the garage when Boforquez and Pichardo started to argue about the CD player; Pichardo approached petitioner, who pushed away Pichardo's hand, reached over to a shelf, grabbed a handgun and pointed it at Pichardo; when Pichardo saw the gun, he ducked; petitioner fired one shot into Pichardo's back; at that moment, Boforquez was behind Pichardo.

Brown testified that once Delgado reached the police station, he spoke with her in an interview room with a concealed video recorder. During that conversation, Delgado agreed to tell Brown the truth as long as she would not "get involved" in the case. When Brown said that he could

not make such a promise, Delgado refused to talk, explaining that she had "kids at home." She left the station without giving Brown a statement.

Salgado and Gordon Cromwell (Cromwell), an inspector for the Contra Costa County District Attorney's office, both testified that they were present when Delgado met with an assistant district attorney immediately before petitioner's preliminary hearing on August 14, 2002. Both men thought Delgado appeared nervous, and they heard her express concern that she and her children would be hurt if she testified truthfully at the hearing. Salgado also heard Delgado reiterate that she had seen petitioner shoot Pichardo in the garage. Salgado and Cromwell also testified that they had encountered Delgado at various times after petitioner's preliminary hearing. Delgado apologized to each man for not telling the truth at the hearing, and she explained that she was afraid for herself and her children.

At trial, Delgado testified that she had heard Boforquez and Pichardo arguing in petitioner's garage about a stolen CD player, but she claimed she did not see the shooting. She also denied: (1) telling Salgado that she had seen petitioner shoot Pichardo; (2) offering to tell Brown the truth on the condition that she not "get involved"; and (3) later apologizing to Salgado and Cromwell for her preliminary hearing testimony.

Juan Carlos Andazola

Petitioner's cousin, Juan Carlos,[5/] testified that he and Gina Guardado (Guardado) were at petitioner's house on the afternoon of the shooting, but that they were unaware of how the shooting had occurred. Juan Carlos acknowledged that he had implicated petitioner as the shooter in a videotaped interview with Brown on April 5, 2002, but he claimed he did so only because Salgado had threatened to arrest him if he did not identify someone as the shooter.

The video of Juan Carlos's interview with Brown was played for the jury. Brown began by telling Juan Carlos that he was arresting Boforquez for attempted murder. Juan Carlos replied, "That's not even what happened" because petitioner had shot Pichardo. Juan Carlos went on to say

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5. We refer to Juan Carlos Andazola as "Juan Carlos" to avoid confusing him with petitioner.

that he and Guardado had been inside the house when they heard a shot. They went outside and saw petitioner running away from the garage, and it appeared "he was putting something" under his shirt. Juan Carlos had seen petitioner with a .22-caliber revolver in the garage just a few days earlier, but he said he did not see petitioner with a gun on the day of the shooting.

Juan Carlos also explained to Brown that he and Guardado had left the scene with Boforquez, but Boforquez separated from them after a few minutes.[6/] A short time later, Juan Carlos and Guardado saw petitioner run toward them from some train tracks. Juan Carlos also informed Brown that a day or two after the shooting, he heard petitioner talk about how he wanted to "shoot [Pichardo] in the face but he moved too quick."

Kathleen And Fermin Ochoa

Kathleen Ochoa, petitioner's aunt and Juan Carlos's mother, lived three blocks from petitioner's house with her husband, Fermin Ochoa. Kathleen and Fermin[7/] both testified at trial that petitioner came to their house on the afternoon of the shooting. Kathleen said that when petitioner entered her home, he appeared upset and told her that someone had tried to rob him and, during a struggle, a gun had fired. She initially testified that he blurted out something like, "I just shot somebody," but on cross-examination she admitted that she could not remember petitioner's exact words.

Fermin testified through a Spanish interpreter that, on the day of the shooting, petitioner had first spoken to him in English and then in Spanish. Petitioner told Fermin that he (petitioner) had shot somebody at his home. Fermin also acknowledged that he did not like petitioner.

THE STANDARD OF REVIEW

The provisions of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) govern this case. *Chein v. Shumsky*, 373 F.3d 978, 983 (9th Cir. 2004) (en banc). Under AEDPA, when

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6. Guardado testified that she left the area with Juan Carlos and Boforquez, but Boforquez soon separated from them. She also remarked that petitioner joined her and Juan Carlos, but seemed quiet and "didn't have no answers." He left a few minutes later.

7. We refer to the Ochoas by their first names to avoid confusion.

reviewing a state criminal conviction, a federal court may grant a writ of habeas corpus only if a state court proceeding "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Under § 2254(d)(1), a state court decision is "contrary to" clearly established Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth" in Supreme Court cases or "if the state court confronts a set of facts that are materially indistinguishable from" a Supreme Court decision but "nevertheless arrives at a result different from" that precedent. *Williams v. Taylor*, 529 U.S. 362 (2000). A state court decision is an unreasonable application of clearly established Federal law if "the state court identifies the correct governing legal principle" from a Supreme Court decision "but unreasonably applies that principle to the facts of the prisoner's case." *Id*. at 413. In considering whether a state court has unreasonably applied Supreme Court precedent, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id*. at 411; see also *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003) (holding that it is not enough that a federal habeas court is left with a "firm conviction" that a state court violated the Constitution and that the state court determination must also be objectively unreasonable); *Bell v. Cone*, 535 U.S. 685, 694 (2002). In conducting habeas review, a federal court must "presum[e] that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam).

Even if the state court's ruling is clearly contrary to or an unreasonable application of Supreme Court precedent, such an error would justify overturning the conviction only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see also Fry v. Pliler*, __ U.S. __, 127 S.Ct. 2321 (2007).

ARGUMENT

I.

THE STATE COURT REASONABLY CONCLUDED THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT PETITIONER'S CONVICTION FOR ATTEMPTED FIRST DEGREE MURDER

Petitioner contends the evidence was insufficient to support his attempted first degree murder conviction in two respects. In Argument I, petitioner contends the jury could not have rationally concluded beyond a reasonable doubt that he shot Pichardo. In Argument II, petitioner contends the jury could not have rationally concluded that he acted with premeditation and deliberation. Neither argument has merit.

As a matter of federal constitutional law, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *see also Herrera v. Collins*, 506 U.S. 390, 402 (1993) ("a conviction based on evidence that fails to meet the *Winship* standard" is an "independent constitutional violation"). A petitioner for a federal writ of habeas corpus faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds. In *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), the United States Supreme Court held that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

After AEDPA, a federal court must apply the standards of *Jackson* with an additional layer of deference. *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262, 1274-1275, *citing* 28 U.S.C. § 2254(d). As a result, this Court must ask whether the decision of the California Court of Appeal reflected an "unreasonable application of" *Jackson* and *Winship* to the facts of this case. *See Juan H. v. Allen*, 408 F.3d at 1277.

In evaluating petitioner's claims of insufficiency of the evidence, the California Court of Appeal applied the *Jackson* standard. Exhibit 4 at 7. Thus, the only question is whether the Court

of Appeal acted unreasonably in concluding that a rational trier of fact could have found that petitioner had shot Pichardo.

The Court of Appeal analyzed the issue as follows:

> We recognize that critical eyewitnesses to the shooting, including the victim, provided conflicting reports of the events. We conclude, however, the jury could reasonably have found that petitioner shot Pichardo. As petitioner argues, Pichardo initially thought Boforquez was the shooter. However, [Pichardo] testified that he "[a]utomatically said [Boforquez] did it" because, at the time of his hospital interviews, he thought Boforquez was the only person standing behind him, and [he] did not remember that he quickly ducked and turned immediately before being shot. He admitted that Boforquez's apologetic phone call influenced his interpretation of the shooting, not because of any threats issued, but because Boforquez's tearful apology and insistence that petitioner shot the gun "caused confusion [as to] who really did do it."[8/] The jury could have reasonably deduced that the trauma of the event, the fact that the victim was shot in the back, the resulting injuries and Pichardo's admitted drug use at the time of the shooting diminished the value of his initial recollection.
>
> Other evidence supports the conclusion petitioner fired the shot. According to [Officer] Salgado, two days after the shooting, Delgado told him she saw petitioner fire one shot into Pichardo's back. Although Delgado recanted this version of events and instead testified that she merely heard but did not see the shooting, the jury could have reasonably found her recantation unconvincing. Both Cromwell and Salgado testified that, prior to the preliminary hearing on August 14, 2002, Delgado expressed her fear that her family would be hurt if she testified truthfully. They also testified that she had apologized to them separately for not telling the truth at the preliminary hearing. Finally, the jury viewed her videotaped conversation with Brown where she affirmed that she had "told Salgado that [she] was gonna . . . tell who it was but . . . didn't want to get involved."
>
> Juan Carlos, petitioner's cousin, also implicated petitioner as the shooter in a videotaped interview with [Officer] Brown. Juan Carlos told Brown that immediately after the shooting, he approached the garage and saw Boforquez, who wanted to help Pichardo, and saw petitioner leave the scene and put something under his shirt or in his pocket. Juan Carlos implied that petitioner may have been hiding a gun because he had seen him with a gun in the garage only a few days earlier.[9/] [Juan Carlos] further indicated that he saw petitioner run back from the train tracks where he believed petitioner had

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8. When asked how Boforquez's phone call influenced his interpretation of the shooting, Pichardo testified as follows: "I had assumed it was [Boforquez] at first, but then I'm thinking well, he couldn't do that because I know him. [¶] But then again, the conversation I had before I was going to leave was like it might have been considered confrontational. And then, as he called me at the hospital, I thought why is he crying to me like this over the phone. And then he's saying Juan did it. So I'm thinking maybe he did do it or maybe he didn't because he was behind me when I did turn, and I didn't see [Boforquez] on the other side of me. [¶] So I mean that then caused confusion because I'm thinking . . . . who really did do it then?"

9. Brown asked Juan Carlos, "Did you see a gun in the guy's hand . . . ?" Juan Carlos replied: "I know he has one."

> hidden the gun.[10/] [Juan Carlos] also told Brown that he had overheard petitioner bragging to a friend about the shooting, saying petitioner "was gonna shoot [Pichardo] in the face but [Pichardo] turned too quick." Although at trial Juan Carlos claimed he had "made up" these statements because he had been threatened by Salgado, the jury viewed the videotape of his interview with Brown and, given the specificity of Juan Carlos's account, could have reasonably deduced that his taped statements were not fabrications.
>
> [Gina] Guardado also testified that she and Juan Carlos approached Brown a few days after the shooting because they both believed the police were after the wrong man (Boforquez). She added that when she and Juan Carlos met petitioner after the shooting he behaved suspiciously and "didn't have no answers" to their questions.
>
> Finally, petitioner's aunt, Kathleen, and her husband, Fermin, testified that petitioner came to their home after the shooting and told each of them that he had shot someone. Although Kathleen admitted on cross-examination that she was unsure of petitioner's exact words, and Fermin acknowledged that he disliked petitioner, the jury was entitled to believe that petitioner had confessed the crime to his aunt and uncle.
>
> We therefore find that substantial evidence supports the jury's conclusion that petitioner shot Pichardo.

Exhibit 4 at 7-9, footnotes in original.

It cannot be said that the Court of Appeal's analysis was unreasonable. The evidence established beyond question that Pichardo was shot by one of two people: petitioner or Boforquez. The evidence linking Boforquez to the shooting was minimal, while the evidence linking petitioner to the shooting was substantial. As shown in greater detail in Argument II below, petitioner had both a motive and the opportunity to commit the crime. Petitioner's behavior immediately before and after the crime was suspicious, while Boforquez's behavior was exculpatory. Perhaps most important, three of petitioner's relatives testified that he admitted the crime—even bragged about it—within a short time of its occurrence. Under California law, the testimony of a single witness is sufficient to support a conviction, and a conviction may only be set aside for insufficient evidence if the testimony on which it is based "is so inherently improbable and impossible of belief as in effect to constitute no evidence at all." *People v. Maxwell*, 94 Cal.App.3d 562, 577 (1979). In light of these principles, the Court of Appeal reasonably found sufficient evidence that petitioner, not Boforquez, had shot Pichardo.

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10. When asked, "Do you know where the gun's at?" Juan Carlos replied, "That's what I was saying, I seen him running down from the train tracks."

II.

THE STATE COURT REASONABLY CONCLUDED THAT THE EVIDENCE WAS SUFFICIENT TO SHOW THAT PETITIONER SHOT PICHARDO WITH PREMEDITATION AND DELIBERATION

Petitioner's second argument is an extension of the first. He argues that the evidence was insufficient to show that he had shot Pichardo with premeditation and deliberation.

In analyzing the claim, the Court of Appeal first stated the relevant California law: "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse. However, the requisite reflection need not span a specific or extended period of time. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." Exhibit 4 at 11, citing *People v. Stitely*, 35 Cal.4th 514, 543 (2005) (internal quotations omitted). The Court of Appeal also noted that premeditation is generally shown by evidence relating to motive, planning activity, and the manner of killing. *Id. See also Drayden v. White*, 232 F.3d 704, 710 (9th Cir. 2000) (denying federal habeas corpus challenge to first degree murder conviction, noting that "California law recognizes that premeditation can occur in a short period of time, provided that the evidence demonstrates 'cold, calculated judgment" on the part of the killer); *id*. at 709 ("Under California law, 'when manner-of-killing evidence strongly suggests premeditation and deliberation, that evidence is enough, by itself, to sustain a conviction for first-degree murder.").

Applying these principles, the Court of Appeal found sufficient evidence of premeditation and deliberation in this case:

> Though a close question, we believe substantial evidence supports the jury's finding. Clear evidence of motive exists. Pichardo testified that he went to petitioner's home because he had been informed by his (Pichardo's) cousin that the "gentleman at the house . . . had heard something about [Pichardo] stealing [the gentleman's] CD player, and [Pichardo] had to explain to [the gentlemen, he (Pichardo)] didn't steal no CD player. So [Pichardo was] going over there to clear it up. [Pichardo's cousin] said [Pichardo needed] to watch out because [the gentleman's] upset." Further, despite petitioner's contention to the contrary, this same testimony reflects an element of planning. One reasonable interpretation of this testimony is that petitioner was not only upset about the theft, but wanted Pichardo to come to his house "to explain" the situation. Thus, petitioner had reason to believe Pichardo would come to his home and had an opportunity to provide for that eventuality by obtaining a firearm. In fact, petitioner's cousin, Juan Carlos, testified that he had seen petitioner with a firearm in the garage a few days before the shooting.

> Pichardo further testified that, after he was asked to leave, he approached petitioner to shake hands. He denied he did so in a provocative fashion. Petitioner had an angry look on his face that Pichardo had not noticed before. Unbeknownst to Pichardo, petitioner was positioned near a firearm located in the garage, and, as Pichardo approached, petitioner grabbed the weapon and shot him. And, according to Juan Carlos, petitioner stated soon after the shooting that he had intended to "shoot [Pichardo] in the face, but he moved too quick." Viewing the evidence in the light most favorable to the People, the jury could have reasonably found that petitioner had a motive to shoot Pichardo, had planned to do so unless Pichardo convincingly established his innocence of the theft, had armed himself with a firearm while Pichardo was in the garage and had decided to shoot Pichardo in the face. This constitutes sufficient evidence of deliberation and premeditation to support the verdict.
>
> [Petitioner] argues that there is no evidence of long-term planning, and, prior to the shooting, Boforquez seemed angrier about the theft of the CD player than petitioner. This contention misses the point. As our Supreme Court has frequently commented, "the requisite reflection need not span a specific or extended period of time. '"'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .'"' [Citation.]" (*People v. Stitely, supra,* 35 Cal.4th at p. 543.) The evidence presented and the inferences appropriately drawn therefrom provide substantial evidence of the requisite state of mind.

Exhibit 4 at 12-13.

Again, the Court of Appeal's analysis cannot be deemed unreasonable. As the Court noted, the act of obtaining a weapon is consistent with premeditation and deliberation under California law. Exhibit 4 at 11, citing *People v. Koontz,* 27 Cal.4th 1041, 1081-1082 (2002). Even where the assailant did not initially plan the fatal encounter with the victim, his use of a firearm against a defenseless person may show sufficient deliberation to support a finding of first degree murder. Exhibit 4 at 11, citing *People v. Bolin*, 18 Cal.4th 297, 332-333 (1998). Similarly, firing at vital body parts such as the head and neck shows preconceived deliberation. *Id.* Finally, "a close-range gunshot to the face is arguably sufficiently 'particular and exacting' to permit an inference that the defendant was acting according to a preconceived design." Exhibit 4 at 11, quoting *People v. Caro,* 46 Cal.3d 1035, 1050 (1988). In sum, the Court of Appeal identified a number of characteristics that are probative of premeditation and deliberation under California law. The Court further found evidence that supported each of those elements: petitioner had a motive to shoot Pichardo, and his behavior before and after the crime showed that he had acted with a pre-existing plan. Thus, the jury, and the Court of Appeal, had ample reason to conclude that petitioner acted with premeditation and deliberation.

III.

THE TRIAL COURT REASONABLY DECLINED TO INSTRUCT THE JURY WITH A PINPOINT DEFENSE INSTRUCTION REGARDING BOFORQUEZ'S CONSCIOUSNESS OF GUILT

Petitioner contends the jurors should have been given a "pinpoint" instruction allowing them to acquit him if they found that Boforquez had attempted to persuade Pichardo to testify falsely at trial. The argument fails because there was no substantial evidence to support such an instruction. In any event, if the failure to give the instruction was error, it was not of constitutional dimension.

Toward the conclusion of trial, the defense attorney asked the court to instruct the jury with five special pinpoint instructions, in addition to the standard CALJIC instructions. *See* CT 527-531, 563-564, 594, 622, 628, 658. Special Instruction Number 2 read as follows:

> If you find that Domincio Borjorquez [*sic*], aka Nene attempted to or did persuade a witness to testify falsely or attempted to or did fabricate evidence to be produced at the trial, such conduct may be considered by you as a circumstance tending to show a consciousness of guilt. Such conduct may be sufficient by itself to raise a reasonable doubt as to the guilt of the defendant. However, its weight and significance, if any, are matter [*sic*] for your determination.

CT 529.

The defense attorney argued that Special Instruction Number 2 was consistent with the defense theory of the case—that Pichardo testified falsely at trial because he had previously been threatened by Boforquez. RT 766-771, 778-779, CT 529-530. The trial court declined to give the instruction because it was not supported by the evidence. RT 779, CT 529.

The state court's factual finding that the instruction was not warranted is presumed correct, 28 U.S.C. § 2254(e)(1), and "should be the final word on the subject." *Menendez v. Terhune*, 422 F.3d 1012, 1029 (9th Cir. 2005). In fact, there was no substantial evidence that Boforquez had tried to persuade Pichardo to testify falsely at trial. The defense attorney argued that Special Instruction Number 2 was supported by the testimony of police officers DelGreco and Brown. RT 766-771, 778-779, CT 529-530. DelGreco testified that he interviewed Pichardo on the night of the shooting, and that Pichardo said he was "certain" he had been shot by Boforquez. RT 724. Brown testified that he interviewed Pichardo three times after the shooting, and that Pichardo's story "kept

changing." RT 675. Brown thought Pichardo "was trying to make up theories about how he was shot. And it just seemed to me it wasn't right, like he'd been threatened." RT 676.

Although Brown's initial suspicions might have provided a colorable basis for Special Instruction Number 2, Brown further testified that he specifically asked Pichardo whether he had been threatened (or "influenced") by Boforquez. RT 676-677, 703. Pichardo said that his conversation with Boforquez had "influenced" him (RT 703), but he added "no threats [were] ever made" (RT 677). Further, Pichardo testified at trial that he had received one phone call from Boforquez at the hospital. RT 280-281. Boforquez was in a "crying way" and he kept saying, "I'm sorry. I'm sorry this happened." RT 280-283, 310-311. Boforquez did not apologize for the shooting, but he expressed regret that it had happened. RT 282. Because Pichardo suspected Boforquez of being the shooter, he asked Boforquez to "turn himself in" to the police. Boforquez responded, "I can't do that." RT 283. Pichardo pressed the issue, and Boforquez said that petitioner had been the shooter. RT 284. Pichardo further testified that Boforquez's call had "changed" the way he thought about the shooting. RT 285. Whereas Pichardo had initially assumed that Boforquez was the shooter, he started to believe, after the call, that petitioner might have been the shooter. RT 285, 311-312. Pichardo insisted, however, that Boforquez had not threatened him in any way. RT 282-283. In light of this testimony as a whole, there was no basis for an instruction allowing the jury to acquit petitioner by speculating that Boforquez had tried to persuade Pichardo to testify falsely at trial.

Even if the trial court had erred in refusing to give Special Instruction Number 2, there would be no basis for federal habeas relief. Preliminarily, "'federal habeas corpus relief does not lie for errors of state law.'" *Estelle v. McGuire*, 502 U.S. 62, 67 (1991), *quoting Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Menendez v. Terhune*, 422 F.3d at 1029 ("Failure to give [a jury] instruction which might be proper as a matter of state law, by itself, does not merit federal habeas relief."). To warrant habeas relief, an error in jury instructions "cannot be merely 'undesirable, erroneous, or even "universally condemned,"' but must violate some due process right guaranteed by the fourteenth amendment." *Prantil v. California*, 843 F.2d 314, 317 (9th Cir. 1988) (quoting

Cupp v. Naughten, 414 U.S. 141, 147 (1973)). To prevail, the petitioner must demonstrate that the erroneous charge "'so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72 (quoting *Cupp*, 414 U.S. at 147). In making its determination, a federal court must evaluate the challenged jury instructions "'in the context of the overall charge to the jury as a component of the entire trial process.'" *Prantil*, 843 F.2d at 817 (quoting *Bashor v. Risley*, 730 F.2d 1228, 1239 (9th Cir. 1984)). A petitioner's burden is "especially heavy" when arguing that the trial court failed to give a requested instruction. *Henderson v. Kibbe*, 431 U.S. 145, 155 (1997).

Here, the Court of Appeal correctly found that if the failure to give petitioner's requested instruction was error, it was harmless under the state law test in *People v. Watson*, 46 Cal.2d 818 (1956). The trial court freely allowed the defense attorney to argue his theory of the case to the jury. *See* RT 779. Accordingly, the defense attorney emphasized in closing argument that Pichardo's trial testimony should be viewed with skepticism in light of his initial belief that Boforquez had been the shooter. RT 861-862. The defense attorney also argued that Pichardo had changed his story because Boforquez had "tried to influence" him through his phone calls. RT 861-863, 872. If the jurors had found the defense theory credible, they were fully permitted to consider it in their deliberations. Indeed, two of the special defense instructions given by the trial court allowed the jury to consider Boforquez's role in the shooting and its aftermath. Special Instruction Number 1 noted that the jurors had heard evidence that Pichardo initially believed he had been shot by Boforquez. RT 813, CT 594, 658. That instruction further told the jurors that petitioner bore no burden of proving that Boforquez had committed the crime, and that if the evidence of Boforquez's role in the shooting raised a reasonable doubt as to petitioner's guilt, the jurors were required to acquit him.[11/] RT 813,

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11. Special Instruction Number 1 was given as follows:

> You have heard evidence that Domincio Bojorquez [*sic*], aka Nene, committed the offenses with which the defendant is charged. The defendant is not required to prove Domincio Bojorquez, aka Nene's, guilt. It is the prosecution that has the burden of proving the defendant guilty beyond a reasonable doubt. Therefore, the defendant is entitled to an acquittal if you have a reasonable doubt as to the defendant's guilt. Evidence that Domincio Bojorquez, aka Nene, committed the charged offenses may by itself raise a reasonable doubt as to the defendant's guilt. However, its weight

CT 594, 658. Special Instruction Number 4, a modification of CALJIC No. 2.52, allowed the jurors to consider evidence of Boforquez's "flight" to Arizona after the shooting in evaluating petitioner's guilt.[12/] RT 795, CT 563, 628.

Other standard instructions also allowed the jury to assess the impact, if any, of Boforquez's phone calls to Pichardo. CALJIC Number 2.13 instructed the jurors as follows:

> Evidence that at some other time a witness made a statement or statements that is or are inconsistent or consistent with his or her testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on that former occasion.

RT 791, CT 549.

CALJIC Number 2.21.2 instructed the jurors:

> A witness who is willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars.

RT 793, CT 554.

Finally, CALJIC Number 2.90 instructed the jurors as to the presumption of innocence and the prosecutor's burden of proving petitioner's guilt beyond a reasonable doubt. RT 797-798, CT 571.

> and significance, if any, are matters for your determination. If after considering all the evidence, including any evidence that another person committed the offenses, you have a reasonable doubt that the defendant committed the offenses, you must find the defendant not guilty.

RT 813, CT 594, 658.

12. Special Instruction Number 4 was given as follows:

> The flight of another person after the commission of a crime, or after that person has been accused of a crime, is not sufficient in itself to establish the guilt of that person, but is a fact which, if proven, may be considered by you in light of all other proved facts in deciding whether you have a reasonable doubt as to the defendant's guilt. The weight to which this circumstance is entitled is a matter for your to decide.

RT 795, CT 628.

Under the circumstances, if the jury believed that Pichardo had lied at trial as a result of Boforquez's phone call, they were permitted to consider that in their deliberations. As a result, the Court of Appeal concluded that any failure to give defense Special Instruction Number 2 was harmless state law error, not a federal due process violation. In light of the instructions and argument, there is no reasonable likelihood the jury was misled. For the same reasons, any constitutional error was harmless under *Brecht*.

IV.

THE PROSECUTOR DID NOT COMMIT *BRADY* ERROR

Shortly after petitioner's trial, one of the prosecution witnesses—Pittsburg police officer Javier Salgado—pleaded guilty to five felony counts of falsifying police reports in unrelated drunk driving cases. All of Salgado's crimes occurred before petitioner's trial. Petitioner contends there is a reasonable probability he would not have been convicted of attempted murder if his jury had been aware of Salgado's criminality. Accordingly, petitioner argues that his conviction was obtained in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).[13/]

In *Brady v. Maryland*, 373 U.S. at 87, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The duty to disclose such evidence: (1) exists even though there has been no request by the accused *(United States v. Agurs*, 427 U.S. 97, 107 (1976)), (2) encompasses impeachment evidence as well as exculpatory evidence (*United States v. Bagley*, 473 U.S. 667, 676 (1985)), and (3) extends even to evidence known only to police investigators and not to the prosecutor *(Kyles v. Whitley*, 514 U.S. 419, 438 (1995)). Evidence is "material" under *Brady*

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13. Petitioner submitted this claim to the California Court of Appeal in his state habeas corpus petition. Because the Court of Appeal summarily denied the claim, this Court must conduct an independent review of the record to determine whether the state court's decision is contrary to, or an unreasonable application of, established Supreme Court law. *Hines v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003).

"if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433; *see also Strickler v. Greene*, 527 U.S. 263, 289 (1999) (a criminal conviction should be reversed under *Brady* if the absence of the suppressed evidence "might have changed the outcome of the trial").

Officer Salgado's conviction for falsifying police reports in unrelated drunk driving cases did not constitute *Brady* evidence in this case because petitioner's conviction was not dependent upon Salgado's trial testimony. Hence, impeachment of Salgado would not have affected the verdict.

As shown in Argument I above, it is undisputed that Pichardo was shot in petitioner's garage, in the immediate presence of petitioner and Boforquez. By all accounts, the shooting occurred as Pichardo was approaching petitioner to shake hands. Pichardo initially thought he had been shot by Boforquez, largely because the bullet struck him in the back and Boforquez was behind him at the time. Upon further reflection, however, Pichardo believed he had turned away from petitioner immediately before he was shot.

Petitioner's defense at trial focused almost exclusively on Pichardo's conflicting accounts of the shooting. The defense attorney argued that the jury could not convict petitioner of attempted murder because the victim had given conflicting accounts of the crime. RT 854-867. The jury had ample reason to conclude, however, that Pichardo's initial recollection of the shooting was faulty. The shooting (and Pichardo's resulting paralysis) must have been extremely traumatic, and Pichardo admitted that he was "stoned" on marijuana (and possibly under the influence of methamphetamine) at the time of the shooting.

More important, the other prosecution evidence, given by a host of independent witnesses, confirmed that petitioner had shot Pichardo.

Kathleen Ochoa, petitioner's aunt, testified that petitioner came to her house on the afternoon of the shooting and blurted out, "I shot someone." Fermin Ochoa testified that petitioner made the same admission to him moments later.

Petitioner's cousin, Juan Carlos Andazola, implicated petitioner as the shooter of Pichardo in an extremely detailed interview with police officer Bruce Brown on April 5, 2002. Juan Carlos told Brown that he saw petitioner running from the garage, apparently hiding something under his shirt, immediately after the shooting. Juan Carlos believed the hidden object was a gun because he had seen petitioner with a .22-millimeter revolver in the garage just a few days earlier. Juan Carlos also told Brown he had heard petitioner bragging in public about the shooting a few days later. Although Juan Carlos claimed at trial that he "made up" these statements because he had been threatened by Officer Salgado, the videotape of the interview shows that Juan Carlos spoke freely and comfortably.

Gina Guardado, Juan Carlos's girlfriend, testified that she and Juan Carlos contacted Officer Brown on April 5, 2002, because they both believed the police were pursuing the wrong man, Boforquez. Guardado added that petitioner had behaved suspiciously when she and Juan Carlos encountered him immediately after the shooting; petitioner seemed unusually quiet and he "didn't have no answers" to their questions.

Officer Salgado added to this evidence by testifying that Griselda Delgado told him, just days after the incident, that she had seen petitioner shoot Pichardo. Salgado testified that Delgado said she saw Pichardo approach petitioner, as if to shake his hand. Petitioner then grabbed a gun from a shelf in the garage and shot Pichardo in the back, as Pichardo was ducking and turning around.

Of course, if the jurors believed Delgado's description of the shooting, as reported by Salgado, they had no alternative but to convict petitioner of attempted murder. For this reason, the prosecutor understandably stated in closing argument that Salgado's testimony was "sort of the linchpin" of the case. (RT 841.) This does not mean, however, that Salgado's testimony was indispensable to the prosecution. Delgrado's description of the shooting was nearly identical to Pichardo's trial testimony, and was consistent with the undisputed forensic evidence (which showed that Pichardo had been shot in the left shoulder blade from an angle slightly above his back). Delgado's testimony was also consistent with all of the other prosecution evidence discussed above.

Finally, although Delgado recanted her report to Salgado at trial, her recantation was suspect for a number of reasons: (1) Delgado was an obviously fearful witness, as reflected by her reluctant and evasive testimony; (2) her recantation was in part self-contradictory (e.g., she initially told police officer Sanchez that she was outside the garage at the time of the shooting, while she testified at trial that she had been inside the garage, but did not see the shooting because she was talking to petitioner's wife); and (3) Delgado's recantation was refuted not only by Salgado, but by the testimony of District Attorney's Inspector Gordon Cromwell and by Delgado's videotaped conversation with Officer Brown on April 5, 2002, who corroborated Salgado regarding Delgado's recantation.

In light of all of this evidence, the Court of Appeal reasonably concluded that the jury verdict against petitioner would not have been affected by the disclosure that Salgado had filed false police reports in a few unrelated drunk driving cases. Thus, there is no basis for federal habeas corpus relief.

CONCLUSION

For the reasons stated, we ask that the petition for writ of habeas corpus be denied.

Dated: February 4, 2008

Respectfully submitted,

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